Supreme Court, U.S.
FILED
SEP 6 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-86

In the Supreme Court of the United States

OCTOBER TERM, 1990

FREDERICK A. SIEGERT, PETITIONER

v.

H. MELVYN GILLEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General
STUART M. GERSON
Assistant Attorney General
BARBARA L. HERWIG
THOMAS M. BONDY
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly dismissed this *Bivens* action on grounds of qualified immunity.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Anderson v. *Creighton*, 483 U.S. 635 (1987)	5-6, 7, 8
Arnold v. *Jones*, 891 F.2d 1370 (8th Cir. 1989)	5
Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971)	2
Butz v. *Economou*, 438 U.S. 478 (1978)	9
Collinson v. *Gott*, 895 F.2d 994 (4th Cir. 1990)	5, 7
Davis v. *Scherer*, 468 U.S. 183 (1984)	10, 11
Elliott v. *Perez*, 751 F.2d 1472 (5th Cir. 1985)	5, 7
F.E. Trotter, Inc. v. *Watkins*, 869 F.2d 1312 (9th Cir. 1989)	5
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	5, 7, 8, 9
Hobson v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985)	6, 9
Martin v. *D.C. Metropolitan Police Dep't*, 812 F.2d 1425 (D.C. Cir. 1987)	7
McIntosh v. *Weinberger*, 810 F.2d 1411 (8th Cir. 1987), vacated, 487 U.S. 1212 (1988)	11
Mitchell v. *Forsyth*, 472 U.S. 511 (1985)	5, 7, 8
Nuclear Transport & Storage, Inc. v. *United States*, 890 F.2d 1348 (6th Cir. 1989), cert. denied, 110 S. Ct. 1807 (1990)	5
Pueblo Neighborhood Health Centers v. *Losavio*, 847 F.2d 642 (10th Cir. 1988)	5, 7, 8
Rakovich v. *Wade*, 850 F.2d 1180 (7th Cir.), cert. denied, 488 U.S. 968 (1988)	5, 7
Westfall v. *Ervin*, 484 U.S. 292 (1988)	10

Constitution, statutes, and rules:

U.S. Const. Amend. V (Due Process Clause)	2

Statutes and rules—Continued:	Page
Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (28 U.S.C. 2679)	10-11
§ 2(a) (4), 102 Stat. 4563	11
§ 8(b), 102 Stat. 4565-4566	11
§ 5, 102 Stat. 4564	11
§ 6, 102 Stat. 4564	11
Fed. R. Civ. P.:	
Rule 8(a) (2)	9
Rule 9(b)	9
Miscellaneous:	
H.R. Rep. No. 700, 100th Cong., 2d Sess. (1988)	11

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-96

FREDERICK A. SIEGERT, PETITIONER

v.

H. MELVYN GILLEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 5a-25a) is reported at 895 F.2d 797. The decision of the district court (Pet. App. 27a-52a) is reported at 692 F. Supp. 1406.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1990. A petition for rehearing was denied on April 16, 1990. Pet. App. 2a-4a. The petition for a writ of certiorari was filed on July 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From November 1979 until October 1985, petitioner was a psychologist at St. Elizabeth's Hospital, a federal government facility in Washington, D.C. On October 1, 1985, he resigned from St. Elizabeth's and began working as a psychologist at a U.S. Army hospital in Bremerhaven, West Germany. In an effort to secure staff privileges at Bremerhaven, petitioner requested that officials at St. Elizabeth's provide his Bremerhaven superiors with all information regarding his job performance at St. Elizabeth's. That request was referred to respondent, a supervisory psychologist at St. Elizabeth's. Respondent sent a letter to Bremerhaven, in which he stated that petitioner was inept, unethical, and untrustworthy. Petitioner alleged that he was subsequently unable to obtain suitable credentials, and was instead relegated to working as a librarian at Bremerhaven. Pet. App. 7a-8a.

Petitioner brought this action in November 1986, claiming that respondent's letter had caused him to lose his post as a psychologist at Bremerhaven, and had rendered him unable to obtain other appropriate employment in his field. Pet. App. 35a. Petitioner alleged that the statements in the letter were false, and that respondent had made those statements maliciously and in bad faith. Amended Compl. ¶¶ 21, 24 (C.A. App. 10-11). Relying in part on *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), petitioner sought six million dollars in damages against respondent in his individual capacity, contending that respondent had violated his rights under the Due Process Clause of the Fifth Amendment of

the United States Constitution. Amended Compl. ¶¶ 1, 21, 30 (C.A. App. 6, 10, 12); C.A. App. 14.[1]

Respondent thereafter filed a motion to dismiss or in the alternative for summary judgment. Respondent contended that petitioner's factual allegations, even if true, did not make out a violation of any constitutional rights. Respondent also asserted a defense of qualified immunity, contending that petitioner's allegations did not state a violation of any "clearly established" constitutional rights within the meaning of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

The district court denied respondent's motion. Pet. App. 27a-52a. The court held that petitioner's factual allegations were sufficient to state a due process claim, because it was well established at the time of the events that "a common law defamation is transformed into a constitutional deprivation of liberty when the government is the source of the defamatory allegations and the resulting 'stigma' involves 'some tangible change of status vis-a-vis the government.'" *Id.* at 44a. The court therefore ordered the parties to conduct certain prescribed discovery. *Id.* at 52a. See also *id.* at 54a.

2. The court of appeals reversed. Pet. App. 5a-25a. With respect to petitioner's "central contention"—that respondent had written the letter to Bremerhaven in bad faith (*id.* at 16a)—the court held that petitioner's allegations of improper motivation were too conclusory to overcome respondent's

---

[1] Petitioner also asserted common law tort theories of defamation, intentional infliction of emotional distress, interference with contractual relations, and interference with prospective advantage. Amended Compl. ¶¶ 2, 31-38 (C.A. App. 6, 12-14).

qualified immunity defense.[2] The court explained that where, as here, improper purpose is an essential component of a plaintiff's constitutional tort action, the plaintiff must allege specific, direct evidence of illicit intent. *Id.* at 11a-14a, 17a-18a. The court held that petitioner's allegations did not satisfy that "heightened pleading standard." *Id.* at 19a. The court stated that "the complaint's shortcoming is most evident in its allegation that [respondent] had acted in bad faith when he described [petitioner] as inept, unethical, and untrustworthy. * * * It merely asserts (and reasserts) that in making the statement he 'knew [it] to be false or [made it] with reckless disregard as to whether it was true.'" *Id.* at 17a.

Chief Judge Wald dissented in part. Pet. App. 19a-25a. Although she agreed with the majority that the district court's finding of no qualified immunity should be vacated (*id.* at 19a), she concluded that petitioner's factual allegations were sufficient "to warrant limited discovery before a judicial resolution of the qualified immunity issue" (*id.* at 24a).

---

[2] The court also ruled that, to the extent petitioner's *Bivens* action was premised on allegations of improper conduct irrespective of subjective intent, the allegations did not state a claim for violation of any clearly established constitutional rights. Pet. App. 14a-16a.

ARGUMENT

1. a. Petitioner contends (Pet. 18-22) that the court of appeals erred in applying a "heightened pleading standard," requiring him to allege specific, nonconclusory evidence of bad faith in order to overcome respondent's assertion of qualified immunity. There is no merit to that contention. The courts of appeals that have addressed the question have uniformly embraced such a heightened pleading standard; indeed, petitioner does not allege a conflict among the circuits. See, *e.g.*, *Collinson* v. *Gott*, 895 F.2d 994, 1002 (4th Cir. 1990) (Phillips, J., concurring in the judgment); *Rakovich* v. *Wade*, 850 F.2d 1180, 1210 & n.22 (7th Cir.) (en banc), cert. denied, 488 U.S. 968 (1988); *Pueblo Neighborhood Health Centers* v. *Losavio*, 847 F.2d 642, 649 (10th Cir. 1988); *Elliott* v. *Perez*, 751 F.2d 1472, 1476 (5th Cir. 1985); see also *Arnold* v. *Jones*, 891 F.2d 1370, 1373 n,3 (8th Cir. 1989); *Nuclear Transport & Storage, Inc.* v. *United States*, 890 F.2d 1348, 1354-1355 (6th Cir. 1989), cert. denied, 110 S. Ct. 1807 (1990).

Petitioner is mistaken in suggesting (Pet. 18) that the heightened pleading standard is inconsistent with this Court's decisions. As the Court has emphasized, *Bivens* actions "frequently run against the innocent as well as the guilty," and meritless claims impose substantial costs "not only [on] the defendant officials, but [also on] society as a whole." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). The Court has therefore insisted that lower courts take appropriate measures to ensure that insubstantial claims are terminated at the earliest possible stage in the litigation. See, *e.g.*, *id.* at 814, 815-816, 819 n.35; *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985); *Anderson* v.

Creighton, 483 U.S. 635, 640 n.2, 646 n.6 (1987).

The heightened pleading standard is applicable in cases in which subjective motivation is an element in the plaintiff's cause of action. Indeed, the point was underscored by this Court in *Harlow*, when it said (457 U.S. at 817-818): "[B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-ranging discovery." Were it possible to overcome a defense of qualified immunity simply by asserting that the question of the defendant's subjective intent is in dispute, the purpose of the qualified immunity defense would be seriously jeopardized. As the D.C. Circuit has observed (*Hobson* v. *Wilson*, 737 F.2d 1, 29 (1984), cert. denied, 470 U.S. 1084 (1985)):

> *Harlow* focused on the need to enable courts to dismiss "insubstantial" lawsuits before discovery and trial, and it [formulated] the qualified immunity defense to facilitate that goal. The kind of case we confront today, involving allegations of unconstitutional motive, offers to litigants a possible means to circumvent the * * * rule, simply by pleading that any act was performed with an intent to violate * * * constitutional rights * * *. * * * [I]n some instances, plaintiffs might allege facts demonstrating that defendants have acted lawfully, append a claim that they did so with an unconstitutional motive, and as a consequence usher defendants into discovery, and perhaps trial, with no hope of success on the merits. The result would be precisely the burden *Harlow* sought to prevent.

Accord, *e.g.*, *F.E. Trotter, Inc.* v. *Watkins*, 869 F.2d 1312, 1316 (9th Cir. 1989) ("This would allow precisely the type of suit that qualified immunity is meant to prevent"). To avoid that possibility, the

courts have held that once the qualified immunity issue is raised, a plaintiff must articulate specific allegations bearing on the defendant's improper purpose, and may not proceed simply on the basis of conclusory assertions. See, *e.g.*, *Losavio*, 847 F.2d at 649; *Rakovich*, 850 F.2d at 1210 & n.22; *Collinson*, 895 F.2d at 1002; see also *Elliott*, 751 F.2d at 1479, 1482. That "heightened" pleading standard strikes an appropriate balance between the interest in vindicating constitutional rights and the interest in shielding government officials from the burden of litigating potentially meritless constitutional claims. See, *e.g.*, *Losavio*, 847 F.2d at 648; *Martin* v. *D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1433 (D.C. Cir. 1987); *Collinson*, 895 F.2d at 1002.

There is no merit to petitioner's contention (Pet. 19) that the heightened pleading standard is too stringent because it precludes discovery. Discovery should not proceed where, as the court below determined, the plaintiff's allegations of malicious intent consist only of conclusory assertions. See *Harlow*, 457 U.S. at 817-818. Rather, the Court has emphasized, insubstantial constitutional tort claims against government officials "should be resolved at the earliest possible stage of [the] litigation" (*Anderson*, 483 U.S. at 646 n.6), and "*prior to discovery* * * * *if possible*" (*id.* at 640 n.2) (emphasis added).

Indeed, petitioner's contention that he is entitled on these pleadings to proceed with discovery misconceives the very nature of the protection that is afforded by qualified immunity. Qualified immunity is just that—an "*immunity from suit* rather than a mere defense to liability." *Mitchell*, 472 U.S. at 526. Accordingly, because "qualified immunity is in part

an entitlement not to be forced to litigate" (*id.* at 527), allowing discovery to proceed in inappropriate circumstances is itself an infringement upon an official's entitlement to qualified immunity. As this Court has stated, in qualified immunity cases "even such pretrial matters as discovery are to be avoided if possible," and "a defendant [properly] pleading qualified immunity is entitled to dismissal *before the commencement of discovery.*" *Mitchell*, 472 U.S. at 526 (emphasis added). She also *Harlow*, 457 U.S. at 818 ("discovery should not be allowed").[3]

Petitioner contends (Pet. 21-22) that the heightened pleading standard is inconsistent with Rule

[3] To be sure, this Court in *Anderson* indicated that in certain circumstances discovery "tailored specifically to the question of [the defendant's] qualified immunity" "may be necessary before [the defendant's] motion for summary judgment on qualified immunity grounds can be resolved." 483 U.S. at 647 n.6. As the court of appeals in the present case explained, however (Pet. App. 18a), those statements referred to a case in which the plaintiff and the defendant presented differing versions of the defendant's conduct. See 483 U.S. at 646-647 n.6. Here, by contrast, there is no dispute for present purposes that respondent composed and sent the letter; the only disputed question is whether he did so with impermissible intent. Nothing in *Anderson* suggests that petitioner may pursue discovery simply in the hope of garnering support for his otherwise unsupported belief that the letter was sent in bad faith. To the contrary, petitioner's approach, under which a plaintiff could proceed to discovery and trial based on conclusory allegations regarding the defendant's *subjective state of mind*, "would totally abandon the concern—which was the driving force behind *Harlow*'s substantial reformulation of qualified-immunity principles—that 'insubstantial claims' against government officials be resolved prior to discovery and on summary judgment if possible" (*Anderson*, 483 U.S. at 640 n.2).

8(a)(2) of the Federal Rules of Civil Procedure, which provides that a complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief."[4] In the context of constitutional tort actions seeking damages against individual government employees, however, this Court has emphasized that the rules of civil procedure must be applied so as to permit proper recognition of qualified immunity and to ensure the early termination of insubstantial suits. *Harlow*, 457 U.S. at 820 n.35; *Butz* v. *Economou*, 438 U.S. 478, 508 (1978). The heightened pleading standard—the requirement that when a claim of qualified immunity is raised, a plaintiff must adequately substantiate conclusory allegations as a condition of going forward—is integral to this objective. Thus, in this context, the standard is an appropriate application of the general requirement of Rule 8(a)(2) that a pleader must show his right to relief. See, *e.g.*, *Hobson*, 737 F.2d at 30; *Losavio*, 847 F.2d at 650. Indeed, anything less would seriously undermine the significance of the qualified immunity rule.

b. The court of appeals properly applied the heightened pleading standard in this case. The allegations of malice and bad faith in the amended complaint are conclusory. As the court of appeals correctly observed, the complaint "merely asserts (and reasserts) that in making the statement [that petitioner was inept, unethical and untrustworthy] he [respondent] knew [it] to be false or [made it] with reckless disregard as to whether it was true." Pet. App. 17a. See Amended Compl. ¶ 23 (C.A. App. 11) ("Defendant made the statement, para. 11, *supra*, knowing that it was untrue or with reckless disregard as to whether it was true or not");

[4] Petitioner similarly relies on the provision of Rule 9(b) that malice and other conditions of mind may be averred generally.

Amended Compl. ¶ 24 (C.A. App. 11) ("Defendant made the statement, para. 11, *supra*, in bad faith and with actual malice"); Amended Compl. ¶ 30 (C.A. App. 12) ("Defendant violated plaintiff's due process guarantees under the Fifth Amendment * * * by maliciously and in bad faith publishing a defamatory *per se* statement, para. 11, *supra*, which defendant knew to be untrue, or with reckless disregard as to whether it was true or not"). And petitioner's affidavit "add[ed] [no]thing more tangible." Pet. App. 17a. As the court of appeals noted (*ibid.*), the allegations of improper motive in the affidavit were "unsupported by any evidence beyond innuendo." See C.A. App. 24-29. The court of appeals' factbound assessment of the pleadings warrants no further review.

2. There is no merit to petitioner's additional contention (Pet. 22-24) that the court of appeals' qualified immunity analysis is contrary to this Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988). This Court held in *Westfall* that a federal employee who has been sued for damages on a common law tort theory is not entitled to absolute immunity unless the challenged conduct is discretionary in nature. That holding has no bearing on the present case because the question of absolute immunity from common law claims is not at issue. Rather, this case concerns the analytically different question of qualified immunity from constitutional claims.

In the latter context, the "discretionary function" question that petitioner points to is governed not by *Westfall*, but by this Court's decision in *Davis* v. *Scherer*, 468 U.S. 183 (1984).[5] The Court in *Davis*

[5] This Court's decision in *Westfall* would be inapposite even if absolute immunity from common law claims were at issue here. Congress responded to the *Westfall* decision by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified in pertinent part at 28 U.S.C. 2679). The new legislation provides federal government employees with absolute immunity from suit for common law tort claims that are based on acts or omissions within the scope of their employment. See §§ 5, 6, 102 Stat. 4564; H.R. Rep. No. 700, 100th Cong., 2d Sess. (1988). The statute was specifically intended to abrogate *Westfall*, and it applies retroactively to actions where, as here, the complaint was pending on the date of its enactment (November 18, 1988). §§ 2(a)(4), 8(b), 102 Stat. 4563, 4565-4566.

made clear that "the scope of the 'ministerial duty' exception to qualified immunity" is extremely narrow. *Id.* at 196 n.14. In particular, "[a] law that fails to specify the precise action that the official must take in each instance creates only discretionary authority." *Id.* at 197 n.14. Petitioner does not and could not argue that respondent's actions fell within this narrow definition of "ministerial duty." Cf. *McIntosh* v. *Weinberger*, 810 F.2d 1411, 1432 (8th Cir. 1987) ("plaintiffs have cited, and we can find, no recent case * * * in which a court has rejected qualified immunity simply because the official in question was performing a ministerial duty"), judgment vacated on other grounds, 487 U.S. 1212 (1988). Providing information about the job performance of a subordinate employee necessarily entails judgment and discretion, and petitioner does not allege that respondent acted contrary to a specific statutory or regulatory directive.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *
STUART M. GERSON
Assistant Attorney General
BARBARA L. HERWIG
THOMAS M. BONDY
Attorneys

SEPTEMBER 1990

---

* The Solicitor General is disqualified in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20-16